NAM National Association of Manufacturers

MANUFACTURING MAKES AMERICA STRONG

Comments

On Premerger Notification; Reporting and Waiting Period Requirements

By the National Association of Manufacturers

Submitted to the Federal Motor Trade Commission on March 29, 2001.

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Manufacturing:

The Key to Economic Growth

- The United States was rated number one in global competitiveness by the Switzerland-based Institute for Management Development by a wide margin — almost 20 percent above its closest competition, Singapore and nearly twice as high as traditional economic rivals, Germany and Japan.

- U.S. manufacturing productivity growth averaged more than 4 percent during 1996 and 1997 — roughly one-third higher than the trend since the early 1980s and nearly three times as great as the rest of the economy.

- U.S. manufacturing's direct share of the Gross Domestic Product (GDP) has remained remarkably stable at 20 percent to 23 percent since World War II. Manufacturing's share of total economic production (GDP plus intermediate activity) is nearly one-third.

- Manufacturing is responsible for two-thirds of the increase in U.S. exports, which have grown to 12.9 percent up from 11.4 percent in 1986.

- No sector of the economy, including the government, provides health care insurance coverage to a greater percentage of its employees. Average total compensation is almost 20 percent higher in manufacturing than in the rest of the economy.

- Technological advance accounts for as much as one-third of the growth in private-sector output, and as much as two-thirds of growth in productivity. The lion's share of this comes from the manufacturing sector, which accounts for more than 70 percent of the nation's total for research and development.

Executive Summary

The National Association of Manufacturers comments on the interim and proposed rules governing the 2000 amendments to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"). These amendments raised the threshold for filing HSR premerger notifications, which the underlying Act did not adjust for inflation. The NAM strongly objects to the existence of the HSR filing fee as a misguided method for funding the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("Division"). Since Congress made clear that it is not ready to eliminate the filing fee, the NAM did not object to its continuation (at this time) as long as the minimum threshold was raised. Raising the threshold will result in the elimination of one-half of all HSR filings. Since the filing fee is the only source of revenue for the FTC and the Division, Congress established larger fees for larger transactions in order to recoup the revenue lost from the increased minimum threshold.

The NAM strongly objects to the provision in the interim and proposed rules that treats the fee levels as notification thresholds. This was never the intent of Congress and will result in filings being made for transactions without a significant competitive impact – which is directly contrary to congressional intent in passing the 2000 amendments. A primary reason for enacting the 2000 amendments was to decrease the number of filings that have no competitive significance. The NAM suggests that the FTC instead institute filing thresholds of: 1) $50 million; 2) 25 percent if valued at more than $1 billion; and 3) 50 percent if valued at more than $50 million. The minimum monetary threshold would apply to the acquisition of both assets and voting securities, while the percentage thresholds would apply to voting securities only.

The NAM also commends the FTC for eliminating a provision that required the payment of two fees for a single transaction; objects to including the identification of the person performing a valuation on the notification form; encourages the FTC to expand rather than narrow the scope of the foreign asset and voting securities exemption; and encourages removal from the notification form of the request to voluntarily list the foreign antitrust authorities to whom the transaction will be reported.

NATIONAL ASSOCIATION OF MANUFACTURERS

COMMENTS REGARDING PREMERGER NOTIFICATION; REPORTING AND WAITING PERIOD REQUIREMENTS

to the

FEDERAL TRADE COMMISSION

MARCH 29, 2001

The National Association of Manufacturers submits these comments in response to the interim and proposed changes to the rules governing premerger notifications under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR") as published in the February 1, 2001, *Federal Register*. The NAM – 18 million people who make things in America – is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 member companies (including 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

The NAM understands that comments were due on March 19, but since the NAM's member companies only recently reported potential problems with the proposed changes, we hope that the Federal Trade Commission and the Antitrust Division ("FTC" and "Division," respectively, and "antitrust agencies" or "agencies" collectively) will take these comments into account despite the tardiness in filing.

It is understandable that the staffs of the antitrust agencies were under tremendous pressure to make substantial changes to the HSR filing procedures in a very short timeframe. The new amendments to the HSR Act ("2000 amendments") were not signed into law until December 21, 2000, yet became effective on February 1, 2001 – a matter of only 41 days, including holidays and weekends.

Nevertheless, the agencies were well aware of the likely changes for many more months, and the NAM is disappointed that the changes were not more adequately explained, especially with respect to the implementation of the new filing-fee requirements. This lack of clarity is a partial explanation as to why the NAM did not hear from its members until the week of March 12, even though the changes took effect on February 1. In addition, while the interim rules and proposed rule changes were announced on January 25, the notice for comment was not published in the *Federal Register* until February 1.

Notification Thresholds

For the 20 years prior to the interim rules, there were four notification thresholds: 1) $15 million; 2) 15 percent; 3) 25 percent; and 4) 50 percent. The $15 million notification threshold includes the acquisition of assets and voting securities, while the percentage thresholds apply to voting securities only. The NAM agrees that the 2000 amendments necessitate that the current notification thresholds be modified. The NAM strongly opposes the agencies' proposed application of the 2000 amendments, however, both as to modifying the notification threshold and the assessment of the fees. (The latter is discussed below.)

As proposed – and as is currently in place as part of the interim rules – these are: 1) $50 million; 2) $100 million; 3) $500 million; 4) 25 percent if valued at more than $1 billion; and 5) 50 percent if valued at more than $50 million. The monetary thresholds apply to the acquisition of both assets and voting securities, while the percentage thresholds apply only to the acquisition of voting securities.

The agencies correctly note that the new thresholds reflect the intent of Congress to eliminate the 15 percent size-of-transaction test. The *Federal Register* discussion, however, also maintains that the FTC concluded that Congress attached some special competitive significance to the $100 million and $500 million thresholds, since the legislation attached larger fees for filings at these levels. But, these thresholds resulted only as an attempt to ensure that the agencies received adequate funding, since raising the minimum monetary threshold from $15 million to $50 million eliminated one-half of all notification filings – and thereby the revenue derived from the filing fees.

The NAM is extremely disappointed that the agencies have interpreted the existence of the $100 million and $500 million thresholds in the legislation as somehow indicating that Congress deemed these levels of competitive consequence. During congressional consideration of the 2000 amendments, the NAM noted that it would accept higher fees in return for an increase in the minimum filing threshold, which had never been adjusted for inflation. Although the NAM fervently believes that the filing fees should be eliminated, when it became apparent that the House and Senate Committees on Appropriations would insist on "revenue neutrality" in return for a minimum monetary threshold adjustment, the NAM agreed that the fees should be raised for the filing of larger premerger notifications. The NAM maintained its support for higher fees for higher levels even after it discovered that "revenue neutrality" entailed a 26 percent increase in funding for the FTC. Throughout this process, the agencies never indicated that they would interpret these fee levels as additional notification thresholds.

True congressional intent was simply to recognize the effects of inflation on the minimum monetary threshold for filing a premerger notification. Had there been no fee for filing, there would have been no reason to make up revenue lost from the elimination of filings

under the adjusted minimum level. Thus, the NAM strongly objects to treating the $100 million and $500 million levels as additional notification thresholds and urges the agencies to instead implement three thresholds: 1) $50 million; 2) 25 percent if valued at more than $1 billion; and 3) 50 percent if valued at more than $50 million. The monetary minimum threshold would apply to the acquisition of both assets and voting securities, while the percentage thresholds would apply to voting securities only. The new filing fee schedule as outlined in the 2000 amendments would, of course, be the amount due to the agencies.

A significant problem concerning valuation would arise if the $100 million and $500 million monetary notification thresholds are retained. Specifically, if there is a sizeable increase in the value of voting securities already held, the purchase of even a minimal amount of additional voting securities could trigger a new filing. As the *Federal Register* notes, the percentage thresholds were established as a way to lessen the notification burden on both the parties to transactions and the antitrust agencies while complying with the spirit of the underlying HSR Act, even though a literal reading could require a notification with each acquisition of voting securities above the minimum monetary threshold. Retention of the intermediate monetary thresholds of $100 million and $500 million reinstates this burden, at least to a degree. It is incongruous that a bill intended to reduce the number of premerger filings is being enforced through rules that will require additional filings with no antitrust significance and that thus will raise revenue not contemplated. Implementing the $100 million and $500 million fee levels as notification levels is akin to the proverbial tail wagging the dog.

Filing Fees

The NAM strongly disagrees that the interpretation of the antitrust agencies on the amount of filing fees to pay is correct. Nevertheless, the NAM hopes that, if the antitrust agencies insist on their interpretation, the interim and the permanent rule changes will be rewritten to make explicit the antitrust agencies' intent as to the total amount of fees they expect parties to acquisitions to pay.

Only by extremely careful reading and parsing of sentences can one conclude that the agencies apparently want the full fees for crossing each threshold. Once again, the intent of the larger fees for larger transactions was to ensure that the antitrust agencies had sufficient revenue to carry out their missions. As proposed – and as in place now as part of the interim rules – if a party filed at the $50 million threshold but over time the value of the securities increases to above $100 million, the purchase of an additional security would spark a notification and $125,000 fee. Nowhere in the notice is there a simple declarative sentence, however, stating that parties would pay the fee level in the 2000 amendments for crossing each threshold ($45,000 for $50 million; $125,000 for $100 million; and $280,000 for $500 million). This will undoubtedly result in confusion for many filers, especially those who are not experienced practitioners, since the safest course of action would be to file at a higher level – with the attendant higher fee – if the party thinks there is even a possibility of an additional acquisition. Given the possibility of the $11,000 per day penalty, the antitrust agencies need to state their intention clearly.

Congressional supporters of increasing the minimum threshold repeatedly made clear that the higher fees for larger transactions were meant solely to recoup the loss of revenue resulting from fewer filings. The amounts were established carefully by looking at the number of past

filings at various levels. These calculations did not take into account the effect of treating the filing fee schedule as a notification level. This in and of itself should dispel any notion that "congressional intent" was to use the new fee thresholds as notification thresholds.

The NAM understands the concern that parties to a transaction could acquire minimal assets and voting securities in order to minimize the fee paid. Nevertheless, there must be some other method that would ensure that the agencies are not gamed and that would not result in a financial windfall for the agencies. Certainly, for example, if parties would like the transaction scrutinized under the 25 percent or 50 percent notification standards, this would often fall above either the $100 million or $500 million fee threshold. The NAM would be willing to work with agency staffs to arrive at an equitable solution.

Transitional Rule Regarding Timeframe for Additional Acquisitions

A well-understood rule regarding HSR premerger notification filings was that the parties would have up to five years to acquire the voting securities up to the threshold above that stated in the notification. The interim rules limit this timeframe to February 1, 2002. The justification given is that it would be burdensome to administer two sets of standards. That may be, but the burden to the staff of the antitrust agencies is far outweighed by the burden to the parties that filed in good faith under the old rules after February 1,1997. This includes those who filed a notification as recently as January 2001 and would therefore have less than one year to conclude acquisitions that were planned to be stretched over a five-year period. If the planned acquisition is not finalized by February 1, 2002, the party would have to file a new notification, thereby incurring the expense of additional filing fees as well as any administrative or other financial

burdens that would result from the new notification, which itself is due to a sudden change in the rules. The NAM urges the antitrust agencies to reinstate the five-year transition since there was no notice prior to January 25, 2001.

Other Provisions

Elimination of Double and Triple Fees: The NAM commends the elimination of the provisions that previously required two or more parties to pay the filing fee, even though there was only one transaction.

Valuation: The proposed form changes include the identification of the person performing the valuation. While the NAM understands that this calculation is important, the appropriate agency staff can easily obtain such information by calling the listed company contact.

Foreign Asset and Voting Securities Exemption: The NAM opposes these changes since they narrow the scope of the exemption. Given that the exemption has not been adjusted for inflation and that the International Competition Policy Advisory Committee last year reported that there were far too many filings involving foreign transactions, the NAM urges the antitrust agencies to broaden the exemption instead.

Listing of Foreign Antitrust Authority: The new form contains a section for the listing of foreign antitrust authorities that will also be notified of the transaction. While this remains voluntary, it is unnecessary and, more importantly, will likely be incomplete since the exact identity of countries to be notified is not always known at the time of filing.

Conclusion

The NAM appreciates the time constraints and pressures that the FTC and the Division were under in developing these new regulations. Additionally, the NAM understands that the existence of the filing-fee requirement has made implementation of the 2000 amendments more complex than it would be absent the filing fees. Unfortunately, of course, only Congress has the power to eliminate this complication. The NAM also stands ready to provide additional information or to answer any questions that the agencies may have. Thank you for your consideration of these views.